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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 180.

GEORGIA HARDWOOD LUMBER COMPANY,

Petitioner,

-against-

COMPANIA DE NAVEGACION TRANSMAR, S. A.,
Owner of the S.S. KOTOR,

Respondent.

BRIEF FOR RESPONDENT.

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COMPANIA DE NAVEGACION TRANSMAR, S. A., OWNER of the S. S. KOTOR,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the District Court containing findings of fact and conclusions of law is officially reported in 48 Fed. Sup. 402 (1942), and is printed in the record herein at pages 8 to 16. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 141 Fed. (2d) 652 (1944), and is printed in the record herein at pages 27 to 33.

Jurisdiction.

Jurisdiction is provided by Title 28 U. S. Code, 347 (a).

As the writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit was limited to

the first and second questions presented by the petition, which questions pertain solely to procedure on appeal, we omit recital of the facts, on the merits of which the Circuit Court of Appeals reversed the findings of the District Court.

The Facts.

The facts concerning the procedure on appeal were succinctly stated by the Circuit Court of Appeals in its opinion, 141 Fed. (2d) 652, 654, as follows:

> "This is the record: On April 20, 1943, a final decree dismissing the libel was entered, and appellant did not within the 90 days from that date fixed by statute *formally* apply for and obtain the allowance of an appeal. Instead, on July 6, it issued, served on, and obtained the acceptance of respondent's proctors of, a notice of appeal, which notice on July 12th it filed in the office of the Clerk of the District Court, at which time *proctors for libellant consulted the district judge on the amount of the appeal bond. This, fixed at $250.00*, was executed in New York on July 16, and with assignment of errors, was mailed to and filed with the clerk on July 21st. On Aug. 6th, libellant prepared and swore to a *formal* petition for appeal, filed it on Aug. 12th, and on August 13th, obtained an order of allowance. On Aug. 30, the district judge signed and filed an order that the libellant be allowed an appeal *nunc pro tunc* as of July 12, 1943, the order reciting that it had been assumed by the proctors for libellant, now appellant, that the clerk of the court would present the notice to the judge for allowance of appeal, and that because of this reliance there is not *in the record* any allowance of this appeal prior to the order of Aug. 13. The

Emphasis throughout is supplied.

order also recited that the district judge learned during the 90 day period of the intention of appellant to appeal from the decree and had not indicated any intention to disallow the same, and undoubtedly would have allowed it if and when so requested, though he was of the opinion that under rule 10 (1) (Appeals in Civil Action) and rule 12 (Appeals in Admiralty), last paragraph (Appeals in Admiralty are otherwise covered by the general rules of the court) of the United States Circuit Court of Appeals for the Fifth Circuit, *formal* allowance was no longer necessary." (R. 30).

The appeal bond was executed in New York on July 16th with a bonding company which had been previously approved as a surety by the District Court in which it was filed.

The Question Presented.

The only question properly presented on this appeal is whether the filing of a notice of appeal in admiralty and an inquiry of the District Judge concerning the amount for which an appeal bond should be posted, and which bond the District Judge set at $250, with full knowledge that the appellant was appealing, and which he so confirmed in a subsequent order, constitute "application * * * duly made within three months * * *".

We submit that what was done goes even further than the mere application that the statute requires and constitutes an *allowance* of the appeal, even though such allowance might quite properly come later.

The Questions as Stated by Petitioner.

The questions upon which this Court granted certiorari are not fair statements of the question presented by this case because they omit pertinent facts which would give an entirely different picture.

POINT I.

Respondent's first question and Point I in support thereof are specious to the only real issue involved and are based on a conclusion of law assuming facts contrary to the findings of the Court below and inconsistent with the record.

Petitioner states in his first question to this Court as follows:

> "1. May an appeal from a final decree in admiralty be taken without making an application for allowance thereof within three months from the entry of the decree appealed from?"

The question actually involved in this case is whether "application" was in fact made within the statutory period. The question as stated by petitioner leaves out the facts pointed out by the Circuit Court of Appeals (R. 30), that a notice of appeal was served on opposing counsel and timely filed to the knowledge of the District Court; that on the same date he was consulted on an appeal bond which he agreed to take in the sum of $250, that the bond was duly executed within the 90-day period and thereafter filed. The question stated by the petitioner cannot fairly be asked in the case at bar since the real question raised is whether what was done constituted an "application" for allowance of appeal.

POINT II.

On the facts of record as collated by the Court below (page 2 this brief) application for allowance of appeal was in fact made within the statutory period, allowed by the District Judge and subsequently confirmed by formal *nunc pro tunc* order.

The second question as presented by the petitioner reads as follows:

> "2. Does the mere filing of a notice of appeal in Admiralty and an inquiry of the District Judge concerning the amount for which a bond for appeal costs should be issued, but without request for allowance of appeal or for any action by the Judge within three months from the entry of the decree, constitute a 'duly made' application for 'allowance' of an appeal in admiralty?"

We have three criticisms of this question. The filing of a notice of appeal is not a "mere" act even in admiralty where, since the new Federal Rules, it constitutes the entire necessary judicial process in all civil suits in all jurisdictions, and the principal and frequently the only process in admiralty suits. Secondly, the question omits the fact that the District Judge was consulted on the day when the notice of appeal, after having been served, was filed in his Court, that he was aware that it had been filed, and that he thereupon, on request, fixed the appeal bond at $250, which was duly executed before the 90 days expired. Thirdly, the word "allowance" does not appear in the statute, although the quotation marks used in the question may create the impression that it does. The word in the statute is "application", not "allowance".

The timely service and filing of a notice of appeal (or under the old cases a petition for appeal) and the action taken by the judge in fixing the bond within the statutory period has been held by this Court and numerous circuit courts of appeals to have constituted timely application and allowance without the necessity of the Court's formal signature. *Brandies v. Cochrane*, 105 U. S. 262 (1882); *Sage v. Central Railroad Co.*, 96 U. S. 712 (1878); *Crescent Wharf & Warehouse Co. v. Pilksbury* (C. C. A. 9th, 1938), 93 Fed. (2d) 764 (cert. den.); *Miller v. Tiebout & Isaac No. 2, supra*; *Brown v. McConnell*, 124 U. S. 489, 491 (1888); *Burley Welding Works v. Lawson* (C. C. A. 5th, 1944), 141 Fed. (2d) 964.

In *Brandies v. Cochrane*, *supra*, the appellant's notice of appeal was conditioned upon giving bond, which appellant failed to do until two years later. Two months after that the appeal was allowed *nunc pro tunc* as of the time the bond was posted. The Court stated:

> "The Circuit Judge, by taking the security and signing this citation, allowed an appeal. No formal order of allowance was necessary. *Sage v. R. R. Co.*, 96 U. S. 714; *Draper v. Davis* (102 U. S. 370). The appeal was, therefore, taken in time. The order of October 8th (*nunc pro tunc*) was not required to give it effect."

In *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941), this Court, at page 582, said:

> "The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is

not affected, to disregard such an irregularity in the interests of substantial justice. *Cf. Taylor v. Voss*, 271 US 176, 70 L ed 889, 46 S Ct 461, 7 Am Bankr Rep (NS) 706, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous appeals. . . ."

The Court went so far as to say:

"The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. *Cf. Alaska Packers Asso. v. Pillsbury*, 301 U. S. 174, 81 L. ed. 988, 57 S. Ct. 682."

It is submitted that the record clearly shows that the scope of the review was in no way affected; that there was no question of good faith of the appellants below, of dilatory tactics or of frivolous appeals. The best evidence of this, perhaps, is the fact that the Circuit Court of Appeals reversed the District Court on the merits in a carefully considered opinion. Substantial justice can only be done by an affirmance of that decision. Were this Court to reverse the opinion of the Circuit Court of Appeals, it would constitute a step backward into a rigorous formalism never before adhered to in our Federal Courts, and particularly courts sitting in admiralty. Every act of a Federal Judge would be without validity if he omitted his formal signature, even though the Judge, as in the case at bar, supplied it later while still of the opinion that it was not necessary.

Counsel believe it significant, as did the Circuit Court of Appeals in the case at bar, that the cases relied upon by petitioner were decided before the new Federal Rules of

Civil Procedure, at a time when the notice of appeal or petition for appeal) was only one step in the appellant's process. While it is true that under Rule 81 (a)(1) the Federal Rules of Civil Procedure do not apply to Admiralty, it has been held by this Court and Circuit Courts of Appeal that if the application is timely filed, the allowance may be made later. *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941); *Heller v. Tietjen & Lang* (C. C. A. 3rd; June 9, 1944), 1944 A. M. C. 951 (unreported elsewhere); *Crump v. Hall* (C. C. A. 5th, 1939), 104 F. (2d) 36; *Wilson v. Alliance Life* (C. C. A. 5th, 1939), 102 F. (2d) 365; *Baxter v. Savings Bank* (C. C. A. 5th, 1937), 92 F. (2d) 404.

POINT III.

On the facts as found by the Circuit Court of Appeals the decision of that Court is in accord with the controlling authorities.

Counsel do not believe that all of the cases cited by petitioner require individual analysis here. Most of those on which he relies were carefully scrutinized by the Circuit Court of Appeals and found not to square with the case at bar on the facts.

To the cases relied upon before and discussed by the Circuit Court, as above, petitioner in his brief has cumulated others to the same effect and equally inapplicable.

Petitioner relies chiefly upon three cases: *Alaska Packers Association v. Pillsbury*, 301 U. S. 174 (1937); *Barrell v. Transportation Company*, 3 Wall. 424, (1866); and *McCabe v. United States*, 307 U. S. 61 (1939). It is submitted that none of these cases are applicable to

the decision of the Circuit Court of Appeals in the case at bar.

Farrell v. Transportation Company, supra, was a case in which the appellant, without any hope of success on the merits, filed in the Circuit Court of Appeals a petition for appeal addressed to the Supreme Court of the United States, with no allowance of any kind from any court. The Supreme Court simply held that such a proceeding was not warranted by any Act of Congress and that the Court had no jurisdiction because there had been no allowance of appeal below. *Cf. Stoffler v. United States*, 319 U. S. 38 (1943), where this Court held that refusal of the District Court even to consider a motion for appeal, and refusal of the Circuit Court of Appeals to allow the appeal, is no bar to an appellant's *right* to appeal. The mere filing of a motion for leave to appeal with the clerk of the District Court was sufficient "application", and preserved appellant's right.

McCrone v. United States, supra, involved an appeal in a civil contempt case, where the petitioner filed his application for an appeal *after the contempt judgment had become unappealable* and before the effective date of the new rules. The Court held that the Rules of Civil Procedure, applicable to "pending" cases, did not apply, since the right to appeal, and the Court's jurisdiction, had been lost prior to the effective date of the Rules.

The *Alaska Packers* case, *supra*, is the principal case upon which petitioner places reliance. The Circuit Court of Appeals found that that case does not square with the one at bar upon the facts. It was decided before the new Federal Rules of Civil Procedure were in effect. Under the 9th Circuit Rule in effect at that time no

allowance of any kind was required, formal or informal, and none was obtained. The case involved a question whether the 9th Circuit Rule was in contradiction of the statute (28 U. S. C. A., Sec. 230). The Court held that it was. *U. S. Watts, W. & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9 (1918); *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254, 255 (1940); *R. F. C. v. Prudence Group, supra.*

The *Alaska Packers* case troubled the Circuit Court of Appeals perhaps even as it troubled the Court in *R. F. C. v. Prudence Group*, where the Court compared it with

* James Wm. Moore and Shirley Adelson, in *The Supreme Court: Its Term*, (1940) 26 Va. L. Rev. at pages 703-04 take this to say in respect of the desirability of the trend toward uniformity and the shedding of superfluous and archaic formalisms of appeal:

> "Since uniformity has been largely achieved as to the record on appeal, should not the simple notice of appeal also be the means of perfecting an appeal to all federal courts except for permissive appeals in bankruptcy? With deference to the Supreme Court it is submitted that the answer should be made in the affirmative. Aside from permissive appeals in bankruptcy, a petition for appeal, allowance and citation are formalities, since the appeal is of right if any appeal is proper. The substitution of simple notice of appeal (and retention of the Jurisdictional Statement for appeals to the Supreme Court) for the present formalized practice would not multiply frivolous or improper appeals. * * * Divergent methods of appeal result inevitably in confusion without compensation." (Citing, *e. g.*, *McTrons v. United States*, 307 U. S. 61 (1939).

And at pages 916-17:

> "On May 22, 1939, the Court promulgated amendments * * * to its Admiralty Rules. * * * the Court substituted five new rules on discovery taken literally from the Federal Rules. * * * By this action and by making the Federal Rules generally applicable to bankruptcy and copyright practice, the civil practice in the federal district courts approaches one system of procedure. *Provision for protecting appeals in admiralty along the lines of the Federal Rules would accelerate this commendable approach.*"

the doctrine invoked in that case that the failure to comply with statutory formalities is not necessarily a jurisdictional defect.

In the *Alaska* case the Court had before it the question of "whether an appeal to a circuit court of appeals from a decree in admiralty from a district court may be taken by simply filing in the office of the clerk of the district court, and serving on the proctor of the adverse party, a notice of appeal". The appeal in the case at bar, however, was duly applied for and *allowed* (albeit informally) within the ninety day period both by the acts of the trial Judge and his intentions as confirmed in his *nunc pro tunc* order of August 30, 1943. That order makes it clear, and the Circuit Court of Appeals so found, that the notice of appeal, after service on opposing proctors, failed to have a *formal* allowance thereof entered thereon by the Judge of that Court, that there was not in the *record* any allowance of the appeal allowed prior thereto, but that the District Judge learned during the ninety day period of the intention of appellant to appeal, and though he was of the opinion that *formal* notice was no longer necessary, and "in order that the record may show said allowance of the appeal prior to the expiration of said ninety day period", it was *formally* allowed *nunc pro tunc* as of the date on which the notice of appeal was filed, the same date on which, in conference with respondent's proctors, he set the appeal bond at $250.

In the *Alaska Packers* case the Court said at page 177:

> "The reasons for requiring that an appeal be duly applied for and allowed is that there may be some assurance that the suit is one in which there may be a review in the circuit court of appeals; that the decree is of such finality or character that it may be

re-examined on appeal; and that appropriate security for costs may be taken where the appellant is not by law exempted from giving such security. . . ."

There is nothing in the statute concerning the *allowance* referred to by the Court. There is no reference as to when the application for review should be allowed or in the precise manner in which it should be done. For that reason it is submitted that the Court in the *Alaska* case went beyond the statute and required more to be done for the perfection of the appeal than the Congress intended.

Respondent submits, however, taking the *Alaska* case at its face value, that the propriety of review; the finality and character permitting re-examination and the amount of appropriate security were all properly considered by Judge Lovett on July 12th when the matter was before him. It must have been with due deliberation that he considered these matters and then and there determined to allow the appeal, a judicial act, as this Court has held. He omitted only his formal signature, which he later supplied in his *nunc pro tunc* order.

In *Crescent Wharf & Warehouse Co.* v. *Pillsbury* (C. C. A. 9th, 1938), 93 Fed. (2d) 761, cert. den. 304 U. S. 571, decided after the decision of this Court in the *Alaska Packers* case, almost identical facts were involved as in the instant case. Rule 1 of the Ninth Circuit, as amended, provided that "Appeals in admiralty shall be taken in accordance with the statutes authorizing allowance of appeals". The only steps taken by appellants had been to file and serve a notice of appeal, and file and obtain the District Judge's approval of a bond for costs of appeal. The bond merely recited that appellants were "about to take" an appeal. The Court, in deciding the

appellants had complied with the statutory essentials, stated:

> "There was, it is true, no formal order allowing the appeal. Such orders, though customary and proper, are not indispensable. No statute prescribes the form or manner in which appeals to this court shall be allowed. In this case, we think the approval of the appeal bond was, in legal effect, an allowance of the appeal" (p. 763).

To the same effect see: *Weinstein* v. *Black Diamond S. S. Corp. et al.* (C. C. A. (2d), 1929), 31 Fed. (2d) 519; *Barlow Welding Works* v. *Lawson* (C. C. A. 5th, 1944), 141 Fed. (2d) 964.

While the Rules of Civil Procedure do not apply to admiralty, the courts have nevertheless adopted the same procedure with respect thereto without conflict with the statute which requires only that "* * * application therefor be duly made within three months * * *".

Admiralty Rule 12 of the Fifth Circuit, after providing that the record on appeal shall be made in the District Court, as provided in Admiralty Rule 49, in a paragraph on the taking of new evidence for consideration by the Circuit Court, states:

> "Appeals in admiralty are otherwise governed by the general rules of this court."

It was this rule (Rule 12) and Rule 10 (1) governing civil appeals under the new Rules of Civil Procedure, to which the District Judge referred in his *nunc pro tunc* order supplying a formal allowance when he stated that he believed formal allowance was no longer necessary.

For the convenience of the Court the Admiralty Rules

of the nine circuits are summarized in the footnote below.[1] *Benedict on Admiralty* (6th ed., 1940), Vol. 3.

It would appear from a resume of the rules of all circuits governing appeals in admiralty that with certain unimportant exceptions, the rule in the Fifth Circuit is generally followed and that no more formalities are required in an admiralty appeal than in any other civil matter. The rule in the Ninth Circuit is undoubtedly the result of the *Alaska Packers* case, which rule was formulated after that case was decided and before the new Rules of Civil Procedure went into effect.

Since the decision in the case at bar by the Circuit Court of Appeals for the Fifth Circuit, *Miller v. Tietjen & Lang, No. 2*, as yet unreported in the Federal Reporter but appearing now in 1944 A. M. C. 949, has been

[1] *First Circuit*—Rule 10. Almost identical with Rules of Civil Procedure. No allowance of any kind required.

Second Circuit—Rule XXXVIII. First sentence requires only filing of a notice of appeal with the Clerk of the District Court. Second sentence requires that allowance of the appeal shall be obtained and filed with the notice. It does not say when the allowance shall be obtained, how or by whom signed, but only that it shall be filed with the notice. In practice this is done by the Clerk.

Third Circuit—Rule 11 (1) follows Civil Rules in interest of uniformity.

Fourth Circuit—Rule 33, 73 (a) and (b) follows Federal Rules of Civil Procedure.

Fifth Circuit—Rule 12. Appeals in admiralty to be governed by the General Rules of the Court.

Sixth Circuit—Rule 12. Identical with Fifth Circuit.

Seventh Circuit—Rule 7. Follows Federal Rules of Civil Procedure.

Eighth Circuit—Same as Seventh Circuit.

Ninth Circuit—Rule 1. "Appeals in admiralty shall be taken by filing with the clerk of the trial court a petition for appeal and obtaining an allowance thereof, within the statutory time." As the statute only provides that an application shall be *duly* made with no provision for an allowance or when it shall be made, this rule appears equivocal.

decided (C. C. A. 3rd, June 19, 1944). In that case a notice of appeal was filed in the district court before the 90-day period expired but the Judge did not sign it until some time later. The court there said:

"Since appeals in the great majority of cases coming to this court are now required to be taken by the filing of a notice of appeal in the district court, this court in the interest of uniformity of procedure has directed by Rule 11 (1) that appeals in admiralty cases shall also be taken by filing a notice of appeal in the district court. The notice of appeal thus filed we regard as a due and sufficient application for the formal allowance of the appeal. In this respect we follow the practice of the Circuit Court of Appeals for the Second Circuit. See Rule 38 of that court. See also *Compania de Navegacion Transmar v. Georgia Hardwood Lumber Co.*, 1944 A. M. C. 575, 141 F. (2d) 652 (5 CCA, 1944). Compare *R. F. C. v. Prudence Group*, 311 U. S. 579 (1941).

In the present case the decree appealed from was entered in the district court on February 7, 1944 and the respondent's notice of appeal was filed in that court on May 4, 1944. Treating the notice as the application for the appeal, in accordance with our practice, it will be seen that the appeal was applied for within three months after the entry of the decree. The application was, therefore, in time.

The appeal was allowed on June 5, 1944, more than three months after the entry of the decree, by a judge of this court acting under the authority conferred upon him by Sec. 132 of the Judicial Code, 28 U. S. C. Sec. 228, his order of allowance being endorsed upon the copy of the notice of appeal filed in this court. The fact that the appeal was not allowed within three months after the entry of the decree is immaterial, however. It is settled that if the application for an appeal was made in time the mere date of its allowance is not controlling. *United States v. Vogt*, 77

U. S. 423, (1870); *Cardona* v. *Quinones*, 240 U. S. 83 (1916). An appellant may not be deprived of his right to an appeal by reason of the failure of a judge to act promptly upon his application.

The motion to dismiss the appeal is denied."

CONCLUSION.

The Court should affirm the opinion of the Circuit Court of Appeals that the serving and filing of notice of appeal coupled with obtaining of a bond on appeal in the amount fixed by the District Judge within the statutory period, together with the other relevant circumstances, constituted due application for and allowance of the appeal.

Respectfully submitted,

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Of Counsel.

Dated: New York, December 7, 1944.

SUPREME COURT OF THE UNITED STATES.

No. 180.—October Term, 1944.

Georgia Hardwood Lumber Company, Petitioner, *vs.* Compania De Navegacion Transmar, S. A., Owner of SS. Kotor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

This is an admiralty case here on certiorari from the Circuit Court of Appeals for the Fifth Circuit. A single question is presented. Petitioner claims that the appeal from the District Court to the Circuit Court of Appeals was not properly taken. Since the Rules of Civil Procedure do not apply to proceedings in admiralty,[1] the question is whether the requirements of § 8(c) of the Act of February 13, 1925, 43 Stat. 936, 940, 28 U. S. C. § 230, were met. That section provides:

"No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

A final decree dismissing the libel was entered on April 20, 1943. On July 6, 1943, the libellant issued a notice of appeal, served it on respondent's proctors and obtained their acceptance. It filed the notice of appeal in the office of the clerk of the District Court on July 12, 1943. Nothing else was done within the three months' period except to consult the district judge on the amount of the appeal bond. The assignment of errors and the appeal bond were filed July 21st. A formal petition for appeal was filed on August 12th and allowed the 13th. On August 30th the district judge entered an order which treated the notice of appeal filed July 12th as an application for allowance of the appeal and granted it. That order recited that the libellant had assumed that the clerk would

[1] Rule 81(a)(1).

present the notice of appeal to the judge for an allowance, that the judge knew within the three months' period of libellant's intention to appeal and would have granted it if he had been so requested, though he assumed a formal allowance was not necessary. The Circuit Court of Appeals held that the notice of appeal filed July 12th was sufficient as an application for an appeal and that the failure to allow it within the three months' period was not fatal. 141 F. 2d 652.

We agree with the Circuit Court of Appeals. Application for an allowance of the appeal was, of course necessary. *Alaska Packers Ass'n* v. *Pillsbury*, 301 U. S. 174; *Wells* v. *United States*, 318 U. S. 257, 260. But the law does not prescribe the form in which an application for allowance of an appeal must be cast. We cannot say that the trial judge abused his discretion in treating the notice of appeal as an application for an allowance. It was properly filed with the clerk of the District Court.[2] *Steffler* v. *United States*, 319 U. S. 38, 40. The intention to appeal was apparent. Only a formal request was lacking. In other instances, where the scope of review was not affected, comparable irregularities in perfecting an appeal have been disregarded in the interests of justice. *Taylor* v. *Voss*, 271 U. S. 176, 182, and cases cited. We do not suggest that the mere filing of a notice of appeal must be taken as adequate. Desirable practice indicates that explicit instead of implied application for an allowance should be made in order to avoid litigation. We hold, however, that there is discretion to treat the notice of appeal as such an application.

Alaska Packers Ass'n v. *Pillsbury*, *supra*, does not require a different result. In that case an appeal was sought to be perfected simply by filing a notice of appeal. But it did not appear that an appeal was ever allowed. The Court held that an appeal must be applied for and allowed. It stressed the importance of the allowance in screening out improper or premature appeals and in making certain that security for costs was pro-

[2] We therefore have a different question from that presented in Reconstruction Finance Corp. v. Prudence Group, 311 U. S. 579, 582, where a notice of appeal was filed in the District Court but the appeal had to be allowed by the Circuit Court of Appeals.

Here the appeal could be allowed either by the trial judge or by a judge of the Circuit Court of Appeals. Alaska Packers Ass'n v. Pillsbury, *supra*; McCrone v. United States, 307 U. S. 61, 65; The Tietjen & Lang No. 2, 143 F. 2d 711, 712; Judicial Code, § 132, 28 U. S. C. § 228.

vided in appropriate cases. 301 U. S. p. 177. We adhere to that decision. Under this statute an allowance of an appeal is essential. *McCrone* v. *United States*, 307 U. S. 61. We only point out that the *Alaska Packers* case did not involve the question presented here, i. e., whether a notice of appeal may suffice as an application for an allowance. Nor did it involve the further question whether the allowance must be made within the three months' period. We held in *Reconstruction Finance Corp.* v. *Prudence Group*, 311 U. S. 579, that a requirement of the Bankruptcy Act that certain appeals "be taken to and allowed by the circuit court of appeals" within a prescribed time was satisfied where the application was timely but the allowance of the appeal came later. Otherwise "the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control." 311 U. S. at 582. That result is even more plainly indicated under the present statute. *The Tietjen & Lang No. 2*, 143 F. 2d. 711. For where, as here, a statute merely requires that an application for an appeal be made within a prescribed time, the allowance may be granted subsequently. *Cardona* v. *Quinones*, 240 U. S. 83.

Affirmed.